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In the
SUPREME COURT of the UNITED STATES
October Term, 1994

No. 94-1471

Varity Corporation,
Petitioners,

v.

Charles Howe, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AS AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2,000 attorneys who specialize in representing individuals in controversies arising from the workplace. It is the country's only professional membership organization of lawyers who represent employees in employee benefits, employment discrimination, wrongful discharge and other

employment-related cases.

NELA has devoted itself to supporting precedent-setting litigation and legislation affecting the rights of individuals in the workplace. NELA has an interest in the application of the Employee Retirement Income Security Act ("ERISA") because the clients of NELA members frequently have employee benefit claims. NELA is qualified to brief this Court on the implications of its decision in this case, having participated as amicus curiae in numerous other cases involving ERISA and other employment laws, including *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517 (1993), and the leading decision on ERISA benefit claims, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

STATEMENT

This case started when Varity Corporation ("Varity" or "the Company") transferred the farm combine equipment operations in its Massey-Ferguson subsidiary to a new company called Massey Combines Corporation ("MCC"). In its Petition for Certiorari, the Company virtually admits it chose a course of action that would likely result in the termination of all benefits for the employees who wound up in the new company. Pet. for Cert. at 18.

The District Court found, as Varity also nearly conceded in its Petition, that Varity misrepresented information about benefits with the new company to plan participants to induce them to consent to transfers to the new company. *Id.* The Company told the employees that "benefit programs will remain unchanged" and offered a side-by-side comparison showing identical health benefits

with the new company. Varity told the employees the new company had a "bright future" even though Varity knew it was "essentially bankrupt." 36 F.3d at 749. Varity deliberately did not tell employees about the power to terminate or amend the benefits that the new company possessed if "necessary," a power the new company was virtually certain to exercise because of Varity's acts. *Id.*

Two years later, MCC collapsed and was placed in receivership. Health benefits for retirees and former employees stopped entirely. The District Judge who heard the evidence called Varity's scheme "a sucker punch on loyal employees who had given a lifetime of service." The Eighth Circuit awarded the retirees approximately $700,000 in lost past-due benefits as restitution and ordered that they be returned to the Massey-Ferguson plans which Varity had induced them to leave. The relief was limited to those persons who had retired before the receivership and would have been Massey-Ferguson retirees if Varity had not induced their transfer to MCC.

SUMMARY OF ARGUMENT

ERISA's plain language and Congress' intent warrant protection of participants' reasonable benefit expectations, not their remediless betrayal. The Eighth Circuit's decision follows the plain language of ERISA Section 502(a)(3) and is consistent with ERISA's intent in protecting participants from misrepresentations. Varity does not merit legal insulation for misrepresentations that induced participants and beneficiaries to give up retiree health coverage with Massey-Ferguson in exchange for worthless benefit coverage with a company that was

virtually bankrupt at its inception.

A fiduciary such as Varity has a duty to tell participants the truth. Even if it has no duty as a corporation to tell participants about internal corporate plans, it cannot, as a plan administrator and fiduciary, "cast a blind eye" while participants are induced to give up their health benefits by affirmative misrepresentations about benefits and the ability of a new company to sustain them without change. The participants and beneficiaries who were deprived of retiree health benefits by Varity's misrepresentations deserve appropriate equitable relief.

ARGUMENT

I. ERISA Section 502(a)(3) Offers a Cause of Action to Participants Who Are Harmed by a Breach of Fiduciary Duty

The language of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes suits by participants or beneficiaries to redress acts that violate "any provision of this title." ERISA Section 502(a)(3) is contained in title I, as is ERISA Section 404, 29 U.S.C. § 1104. Consequently, "any provision of this title" includes the fiduciary duties in ERISA Section 404. To redress such violations, ERISA Section 502(a)(3) offers "appropriate equitable relief" to participants and beneficiaries.

The existence of an ERISA Section 502(a)(3) cause of action may be analyzed in three steps:

A. Are the plaintiffs "participants or beneficiaries" who may sue under ERISA Section 502(a)(3)?

B. Is a breach of fiduciary duty a violation of "any provision of this title" that participants may sue to relieve under Section 502(a)(3)?

C. May the participants and beneficiaries who are harmed by a breach of fiduciary duty obtain appropriate equitable relief under Section 502(a)(3) for the violation?

A. The Plaintiffs Are Participants and Beneficiaries

The answer to the first question is undisputed: The plaintiffs are participants and beneficiaries who may sue under ERISA Section 502(a)(3). Every circuit recognizes that an individual participant has standing to bring suit under Section 502(a)(3).

B. A Fiduciary's Breach of Duty Violates Title I of ERISA

The answer to the second question is also clear. "[T]his title" refers to title I of ERISA, the title in which ERISA Section 502(a)(3) is found. ERISA Section 404 is a provision in Part 4 of Title I. Therefore, ERISA Section 404's fiduciary duties are a "provision of this title" that participants may sue to enforce under Section 502(a)(3).

One of a fiduciary's most fundamental duties is not to deceive the beneficiaries. Black-letter trust law establishes, moreover, that "[a] beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by [a fiduc-

iary's] silence as well as by the spoken word." *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N.Y. 483, 489, 121 N.E. 378, 380 (1918) (Cardozo, J.).

Each circuit that has addressed the question holds that a fiduciary's misrepresentation to a participant or beneficiary is a breach of fiduciary duty under ERISA. As the Eighth Circuit held here, quoting *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988), "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence in 29 U.S.C. §1104 are owed." 36 F.3d at 754. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, ___ F.3d ___, 1995 U.S. App. LEXIS 15921, *15 (3d Cir. June 28, 1995); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 986 (3d Cir. 1995); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993); *Berlin v. Mich. Bell Tel. Co.*, *supra*; *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993); *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399 (8th Cir. 1995); *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984); *Maez v. Mountain States Tel.*, 54 F.3d 1488, 1995 U.S. App. LEXIS 9155, *32 (10th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747,

750 (D.C. Cir. 1990).[1]

C. ERISA Section 502(a)(3) Offers Participants and Beneficiaries Appropriate Equitable Relief for a Breach of Fiduciary Duty

The answer to the third question should also be clear. Section 502(a)(3) offers injunctive and other "appropriate equitable relief" to participants and beneficiaries who sue to obtain relief for a violation of "this title." As discussed above, "this title" includes the fiduciary duty provisions in title I of ERISA. In *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2069 (1993), this Court held that ERISA Section 502(a)(3)'s appropriate equitable relief includes restitution, as well as injunctive relief. In this case, the Eighth Circuit ordered restitution and injunctive relief.

Varity nonetheless argues that the relief the Eighth Circuit granted is, while concededly equitable, unavailable to the participants or beneficiaries because only plan-based relief may be offered under Section 502(a)(3) for a breach of fiduciary duty. In this fashion, the Company unabashedly petitions this Court to protect it from responsibility "even" if it "misrepresents ... information" to plan partici-

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[1] In its Petition for Certiorari, Petitioner suggested a dispute about whether misrepresentations by a fiduciary are a breach of duty when none of ERISA's specific disclosure rules are violated. Pet. for Cert. at 22-23. It later conceded that issue, Reply Pet. at 3, and now argues that the misrepresentations at issue were not made in its fiduciary capacities. NELA addresses this argument below.

pants and beneficiaries. Pet. for Cert. at 18; *id.* at 16.[2]

While Varity maintains the Eighth Circuit reads ERISA Section 502(a)(3) "in isolation from the full context of Part 4 of ERISA," Br. of Pet. at 28-29, presumably it would not contend that remedies for violating all sections in Part 4 of Title I run only to the plan. For example, it would be nonsensical for relief for a violation of the statute's rules on plan documents and amendments in ERISA Section 402, 29 U.S.C. § 1102, at issue in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), to run only to the plan. If so, a participant unlawfully deprived of benefits by violations of these sections could not obtain an injunction and other appropriate equitable relief in his or her favor. Thus, the Company's argument could not extend to all of Part 4 of ERISA. ERISA Section 404 would have to be *sui generis*.

If the Company's effort to change federal law were adopted, Section 502(a)(3) would effectively be rewritten to offer "appropriate equitable relief" for violation of "any provision of this title, *except Section 404's fiduciary responsibility provision in which case relief shall only be to the plan.*" This alteration would create a gaping hole in "appropriate equitable relief" that neither Section 502(a)(3) nor *Mertens* expresses. Injunctive and other "appropriate equitable

[2] It is difficult to overlook that Varity advances these arguments through a well-known free speech attorney: With these arguments, Varity ironically seeks greater insulation from responsibility for misrepresentations about employee benefits under ERISA than the press possesses for its speech under the First Amendment.

relief" would somehow not offer equitable relief to the participants and beneficiaries who are harmed by a fiduciary's misrepresentations.

Varity and its amici argue, in essence that Congress inadvertently left out language limiting Section 502(a)(3)'s relief for a breach of fiduciary duty to relief running to the plan. However, as this Court stated in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985):

> "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' [citation omitted]."

When Congress meant to limit relief to the plan, it did so. Thus, Section 409 includes in two places the limiting words "to such plan," which Varity now seeks to place in Section 502(a)(3). See *Russell, supra*. Just as the absence of authorization of remedies beyond those enumerated provides "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly," *Russell*, 473 U.S. at 146, so the absence of limiting language in Section 502(a)(3) that is present in Section 409 provides strong evidence that no limitation such as that proposed by the Petitioner was intended.[3]

[3] In two other places in the civil enforcement provisions, Congress demonstrated that it knew how to limit enforcement provisions to specific sections of title I. In Section 501, criminal penalties are applied only to violations of Part I of ERISA. In

An exception that restricts equitable relief for a breach of fiduciary duty to the "plan" is also inconsistent with the plain language of ERISA Section 404. Under ERISA Section 404, a fiduciary must discharge its duties "solely in the interest of the *participants and beneficiaries*" and "for the exclusive purpose of providing benefits to participants and their beneficiaries." It makes little sense to say that the relief for violations of duties owed to "participants and beneficiaries" may only go to the plan.

What purpose would Congress have had to strike the "balance" the Petitioner advances: To deny participants and beneficiaries equitable relief for the harm a fiduciary's misrepresentations cause? The unambiguous language of ERISA and its extensive legislative history suggest exactly the opposite Congressional purpose. ERISA was enacted, by nearly unanimous votes in both Houses, as remedial legislation to protect employees' and retirees' "anticipated" benefits. ERISA Section 2, 29 U.S.C. § 1001. ERISA is designed to protect the interests of employees and their beneficiaries in pension and welfare plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA was, by no stretch of the imagination, enacted to protect companies who engage in misrepresentations as part of a scheme to defeat anticipated benefits. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989), this Court recognized

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Section 502(a)(5), certain restrictions are placed on the Secretary of Labor's ability to enforce Parts 2 and 3 of Title I. By contrast, ERISA Section 502(a)(3) does not limit the enforcement of ERISA's fiduciary duties by participants and beneficiaries, except that the relief must be injunctive or other appropriate equitable relief.

that Firestone's "reading of ERISA would require us to impose a standard ... that would afford participants less protection than they enjoyed before ERISA was enacted."

Following *Bruch* and this Court's decision in *Mertens v. Hewitt Associates*, Petitioner pays lip service to ERISA's primary goal of benefitting employees, but emphasizes a purported subsidiary goal of containing benefit costs. Br. of Pet. at 33-38. Apart from whether Congress adopted such a subsidiary goal, or merely considered costs in relation to particular rules (e.g., deciding not to impose minimum statutory standards on the vesting of early retirement), the support Petitioner finds in this subsidiary goal in this case is perplexing: Is Petitioner seriously contending Congress intended to give employers a free ticket to misrepresent plan benefits to participants and beneficiaries in order to contain benefit costs?

In offering relief to the plan's participants for a breach of fiduciary duty, the plain language of ERISA Sections 502(a)(3) and 404 follows the common law of trusts. As Justice Brennan stated in his concurrence in *Mass. Mutual Life Ins. Co. v. Russell, supra*, 473 U.S. at 152-53 (1985), "fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." "Similarly fundamental in the law of trusts is the principle that 'courts will give to beneficiaries the remedies necessary for the protection of their interests.'" *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, 12 F.3d 1292, 1299 (3d Cir.), *cert. denied*, 113 S.Ct. 61 (1993) (quoting Justice Brennan's concurrence in *Russell* and Austin W. Scott, *Law of Trusts* § 199 at 1638 (1967)). *See also Restatement (Second) of Trusts* § 205, comment i (1959)

(axiom of trust law is that a trustee will not be permitted to benefit from his own breach).

ERISA Section 502(a)(3) completes ERISA's enforcement scheme by authorizing courts to develop appropriate equitable remedies to protect participants and beneficiaries. In *Mertens v. Hewitt Associates*, *supra*, 113 S.Ct. at 2069, this Court held that Section 502(a)(3)'s authorization of appropriate equitable relief offers at least traditional equitable relief, including injunctive relief and restitution. In *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133 (1990), this Court also stated that the equitable relief available at state law is "well within the power" of federal courts to provide under ERISA Section 502(a)(3). In *Mitchell v. DeMain Jewelry*, 361 U.S. 288 (1960), this Court further held:

> "Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.... When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."

361 U.S. at 291-92 (citations omitted).

The Third, Seventh, Eighth and District of Columbia Circuits hold that equitable relief may be granted to an

individual who is harmed by a breach of fiduciary duty. *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, *supra*, 1995 U.S. App. LEXIS at 15921 *30-37; *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, *supra*, 12 F.3d at 1299-1300 (equitable relief is available to individual under Section 502(a)(3) for misleading information); *Anweiler v. American Elec. Power Service Corp.*, *supra*, 3 F.3d at 993 (equitable relief may be granted to individual participant under Section 502(a)(3) for breach of fiduciary duty in failing to disclose that reimbursement agreement was voluntary); *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 230 (7th Cir. 1990) (ERISA Section 502(a)(3) may impose liability on a fiduciary that runs directly to the beneficiary); *Howe v. Varity Corp.*, *supra*, 36 F.3d at 754-55 (rejecting employer's argument that Section 502(a)(3) claims can only be brought on behalf of a plan and cannot inure to the participants' benefit; participants cannot collect monetary damages as such, but they may obtain full range of individual equitable relief, including restitution); *Eddy v. Colonial Life*, *supra*, 919 F.2d at 750. *See also Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, 113 S.Ct. 812 (1992) (acknowledging that Section 502(a)(3) offers equitable relief to participants for fiduciary breaches).

The Ninth Circuit is the only circuit that seems to support the position that participants and beneficiaries may not receive appropriate equitable relief under ERISA Section 502(a)(3) for a breach of fiduciary duty. *See McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956 (9th Cir. 1995); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991). But a careful reading of these cases shows that in neither did the participants and beneficiaries seek

equitable relief for misrepresentations; instead, they sought compensatory damages (*McLeod*) or benefits due if discretionary authority were exercised in their favor (*Horan*). The Ninth Circuit has also failed to reconcile *McLeod* and *Horan* with a case holding it is a breach of fiduciary duty for a fiduciary to misrepresent benefits. *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989).

In other cases where the relief sought is equitable, the Ninth Circuit has allowed participants to obtain relief for a breach of fiduciary responsibilities under ERISA Sections 502(a)(3) and 409. It requires that a company like Varity make restitution to the plan for the breach of fiduciary duty and orders that participants be paid under a constructive trust. *See ACTWU v. Murdock*, 861 F.2d 1406, 1416-17 (9th Cir. 1988); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337 (9th Cir. 1994).[4]

Varity nevertheless invokes the well-known interpretive principle that "the specific governs over the general." Br. of Pet. at 21-22. Varity argues that Congress could not have meant ERISA Section 502(a)(3) to be used to challenge a violation of fiduciary duties on behalf of participants, as opposed to the plan, since ERISA Section

[4] *See* S. Rep. No. 383, 93d Cong., 2d Sess. 105-06, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4989, and I ERISA Leg. Hist. 1063, 1173 ("constructive trust may be imposed on the plan assets to protect the participants and beneficiaries"); *Anweiler v. American Electric Power Serv. Corp.*, *supra*, 3 F.3d at 992-93; *Iwans v. Aetna Life Ins. Corp.*, 855 F. Supp. 579 (D. Conn. 1994).

502(a)(2), 29 U.S.C. § 1132(a)(2), addresses fiduciary duties and provides remedies only for the plan.

Varity's interpretive principle is, however, used in cases in which one reading of a general statutory provision would control or nullify a specific statutory rule. Usually, the general provision is removed in time of adoption or statutory location from the specific rule. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974). Here, the Eighth Circuit's reading of the simultaneously enacted, directly adjacent Section 502(a)(3) does not, except in Varity's mind, control or nullify Section 502(a)(2). It leaves Section 502(a)(2) "as is" and complements it with remedies offered by the plain language of Section 502(a)(3).

More specifically, ERISA Section 502(a)(2) offers "appropriate relief under [ERISA] Section 409," 29 U.S.C. § 1109. Section 409 imposes personal liability on fiduciaries to "make good to [the] plan any losses to the plan" resulting from the breach and to "restore to [the] plan any profits" the fiduciaries have made through use of plan assets. In *Russell*, this Court interpreted the concluding clause in Section 409 offering "such other equitable or remedial relief as the court may deem appropriate" as offering relief to the "plan" in this context. 473 U.S. at 140-42.

Yet, there are unquestionably breaches of fiduciary duty, especially involving misrepresentations and nondisclosure, that impact not the plan as a whole, but individuals or groups of participants and beneficiaries. Such breaches cause the participants or beneficiaries (not the plan as a whole) to incur losses, and may not yield direct profits to

fiduciaries like Varity from use of plan assets (but rather reduce benefit obligations). It is those breaches that Section 502(a)(3) addresses. The two sections thus have separate, complementary functions: Section 502(a)(2) protects the plan; Section 502(a)(3) protects participants and beneficiaries.[5]

Varity's argument depends on viewing ERISA Section 409 as barring the door to any other relief for breaches of fiduciary duty. It is only if this prohibitive construction is accepted that ERISA Section 502(a)(2) can be viewed as controlled or nullified by ERISA Section 502(a)(3). NELA's review of ERISA's legislative history finds no direct or indirect support for Petitioner's argument that "ERISA's legislative history confirms that the remedies ultimately placed in § 409 were meant to cover all actions for breach of fiduciary duty." Br. of Pet. at 26. While practically every ERISA bill made fiduciaries liable to "make good to such plan losses to the plan," as Petitioner asserts, the civil enforcement sections of ERISA were never so limited. For example, the bill the Senate Labor Committee reported offered "appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary." S.4 (as reported), 93d Cong., 1st Sess. § 603, *reprinted in* I ERISA Leg. Hist. at 579; *see* S.1179 (as reported by the Senate Finance

[5] Remedies under ERISA Section 502(a)(2) include monetary damages for losses to the plan. Thus, the remedies to the plan are broader than the equitable remedies offered participants and beneficiaries under ERISA Section 502(a)(3). *Mertens*, 115 S.Ct. at 2067.

Committee), 93d Cong., 1st Sess. § 501(d)(1), *reprinted in* I ERISA Leg. Hist. at 950 ("to redress or prevent any violation").

The Conference Committee's restoration of language to the civil enforcement section offering "appropriate equitable relief" for violations of this title, in addition to injunctive relief, must be seen in this light as a considered completion of ERISA's carefully-crafted enforcement scheme. *See also* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107, and III ERISA Leg. Hist. 4277, 4594 ("[u]nder the conference agreement, civil actions may be brought by a participant or beneficiary ... for relief from breach of fiduciary responsibility"); 120 Cong. Rec. S-15737 (Aug. 22, 1974), *reprinted in* III ERISA Leg. Hist. 4743 (statement of Senator Harrison Williams, principal Senate sponsor with Senator Jacob Javits: "objectives of these provisions" are "to make applicable the law of trusts ... and to provide effective remedies for breaches of trust").[6]

In *Russell*, *Mertens* and other decisions on ERISA,

[6] Petitioner's suggestion that a change by the Conference Committee is not intended to mean what it states because it "first appeared only in the statute as reported out of the Joint Conference Committee" is remarkable. Br. of Pet. at 26-27. When Congress deletes limiting language prior to enactment that was included in an earlier version of the bill, the limitation is presumed not to be intended. *Russello v. United States*, 464 U.S. 16, 23-24 (1983). The standard for overcoming this presumption should be especially high when the Conference Committee is responsible for the change.

this Court has emphasized that Congress carefully crafted ERISA's relief provisions. Consequently, as discussed above, the Court has been unwilling to infer remedies that Congress did not express in so many words. *See, e.g., Russell, supra*, 473 U.S. at 147. It should be even more unwilling to read out remedies that Congress plainly offered to participants and beneficiaries.

While the raison d'etre of the fiduciary provisions is indisputably to protect participants as well as the plan as an entity, the argument Varity and its amici advance would read all fiduciary duties owed to participants out of ERISA. Advancing this argument as the proper interpretation of a remedial statute like ERISA is illogical and harmful to those the statute is to protect. The plain language and function of ERISA Section 502(a)(3) is to "enjoin any act or practice" that violates Title I of ERISA, including breaches of fiduciary duties, and to offer other appropriate equitable relief for the violation. This Court has already held in *Mertens* that "appropriate equitable relief" under this Section includes restitution, as well as injunctive relief.

II. The Remaining Issues Are Narrower, Fact-Based Issues on Which the Eighth Circuit Should Be Affirmed

The answers to the questions discussed above are clear. As a result, Petitioner Varity is left with a narrower, fact-based argument that questions:

- Whether the Company acted as a fiduciary when it made the misrepresentations.

Additionally, amicus U.S. Chamber of Commerce questions

on the Company's behalf:

- Whether the Eighth Circuit's order of restitution is appropriate in the circumstances of this case. (The Chamber of Commerce does not challenge the injunctive order.)

Each of these arguments lacks merit.

A. Varity Violated Its Fiduciary Responsibilities in This Case

Petitioner conceded in its Reply Brief in support of certiorari that the issue is not whether an ERISA fiduciary must communicate complete and accurate material information to plan beneficiaries. Reply Pet. for Cert. at 3. Petitioner narrowed the issue to whether Varity acted in a fiduciary capacity when it communicated information about internal business decisions that might affect the future provision of benefits. Petitioner concedes, as it must, that Varity was a plan administrator and fiduciary. It merely contends that at the moments when it made misrepresentations about benefits, it was speaking solely as a corporation, and not in any respect as a fiduciary.

As discussed further below, case law supports the Eighth Circuit's determination that Varity breached its fiduciary duty by both misrepresenting the new plan's benefits and not informing participants of the misrepresentations. We first appreciate that the Eighth Circuit's analysis is more discerning than Varity describes. Petitioner describes the issue as whether the failure to disclose its internal assessment of MCC's business prospects constituted misleading communications about plan administration.

Varity next states ERISA was not meant to require a company to furnish its internal views of the likelihood of success of a business to employees. Pet. for Cert. at 23. However, the Petitioner nearly overlooks that the Eighth Circuit agreed with the Company on this score and held there was no fiduciary duty for Varity to disclose its internal assessment of MCC as such. 36 F.3d at 753.

Instead, the Eighth Circuit held that the fiduciary duty arose when Varity chose to speak about benefits and MCC's prospects. When Varity chose to speak about benefits, describing the benefits as identical and offering a side-by-side comparison of benefits, along with MCC's prospects, it had a fiduciary duty to tell the plan's beneficiaries the truth. 36 F.3d at 753-54. The Eighth Circuit also held to the extent Varity made its misrepresentations in a non-fiduciary capacity, Varity had an affirmative duty as the plan administrator/fiduciary to inform beneficiaries of its knowledge of those misrepresentations before the beneficiaries plunged on a ruinous course. 36 F.3d at 754 (following *Eddy v. Colonial Life Ins. Co.*, *supra*).

A trust law analogy that tracks the facts in this case illuminates this issue. Assume Varity, in addition to running a business, administers a trust for its employees that offers health benefits in retirement. The trust is not pre-funded but has a reliable source of funding under the plan instruments, namely, Varity's corporate assets. Varity creates a new company with a superficially identical trust but no assets from which to draw to fund the benefits. Benefits under the second trust are conditioned on beneficiaries in the first trust giving up their status as beneficiaries. Varity has a substantial financial interest in a large

number of them giving up their status. Varity also knows the funding for the second trust is non-existent and that the superficially identical benefits will soon be eliminated.

NELA submits it is a fiduciary violation for Varity, which has fiduciary responsibilities, to affirmatively represent to trust beneficiaries that their benefits are identical and "unchanged" and exhort them that the new company with the power to eliminate them has a "bright future," when it knows those statements are false. A second fiduciary violation is for Varity as a fiduciary and plan administrator to let the trust's beneficiaries willingly give up their valuable standing based on such misrepresentations and move to a "ruinous" situation without telling them what it knows. The still more egregious fiduciary violation is for Varity to make such misrepresentations to the plan's beneficiaries for its own financial gain as a corporation without disclosing that it speaks not as a fiduciary but as a company which believes it is not responsible for any misrepresentations it makes.

To argue that these fiduciary violations do not exist because Varity was purportedly not wearing its administrator "hat" at the time it made the misrepresentations is to assume an unproven fact and ignore Varity's duty as a fiduciary to speak up to protect the beneficiaries to whom it owes complete loyalty. A fiduciary cannot lie to beneficiaries for the fiduciary's own financial gain and avoid responsibility by maintaining that it told the lies in its conflicting capacity and had no responsibility as a fiduciary to tell the beneficiaries the truth. The unproven fact, moreover, is that Varity spoke as a non-fiduciary: Varity was undeniably the plan administrator and fiduciary, but it

never told participants it made its side-by-side benefit comparison and representations about benefits in a wholly non-fiduciary capacity, and not in its capacity as the plan's administrator and fiduciary.

When a person who has fiduciary responsibilities functions in a second non-fiduciary capacity, the common law has long required complete and unambiguous disclosure to the trust beneficiaries that the fiduciary's duties may be compromised by the competing interest:

> "[T]he disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.... Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion."

Wendt v. Fischer, 243 N.Y. 439, 443, 154 N.E. 303 (N.Y. 1926) (Cardozo, J.) (realtor with fiduciary duty to sell property on favorable terms breached duty to disclose interest in transaction; equivocal and indefinite disclosure that sale was to a "client of theirs" was not sufficient). *See also Restatement (Second) of Trusts*, § 173 comment d (1959) (trustee has duty to communicate "material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person").

Under ERISA, the First, Second, Third, Sixth and Tenth Circuits have joined the Eighth Circuit in holding that a company that functions in a dual capacity as a plan administrator breaches its fiduciary duties when it makes misrepresentations to ERISA participants about benefits the company has just established under another plan, or

may establish in the future. *Maez v. Mountain States Tel., supra*, 1995 U.S. App. LEXIS at 9155 *33-34; *Mullins v. Pfizer, Inc., supra*, 23 F.3d at 668-69; *Vartanian v. Monsanto Co., supra*, 14 F.3d at 702; *Fischer v. Philadelphia Electric Co., supra*, 994 F.2d at 133-35; *Drennan v. General Motors Corp., supra*, 977 F.2d at 251.[7]

Even if Varity's misrepresentations were made in a wholly non-fiduciary capacity, as it now contends without record support, Varity had a duty as a fiduciary to warn the beneficiaries about what it knew to be misrepresentations. 36 F.3d at 754. The Second, Third, Fourth and District of Columbia Circuits have joined the Eighth in holding that a company that functions as a plan administrator has a duty to inform participants of circumstances that threaten benefits. As a fiduciary, the company cannot stand by silently when it knows of circumstances that threaten the participants' benefits. *Dellacava v. Painters Pension Fund*, 851 F.2d 22, 27 (2d Cir. 1988); *Bixler v. Central Pa. Teamsters Health & Wel. Fund, supra*, 12 F.3d at 1300 (plan administrator has affirmative duty "to speak when it knows that silence might be harmful"); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 73-74 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Howe v. Varity Corp., supra*, 36 F.3d at 754; *Eddy v. Colonial Life Ins. Co., supra*, 919 F.2d at 750-51.

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[7] The Company suggests misrepresentations have to be about plan terms or administration to be actionable. Br. of Pet. at 31-32, 40. NELA is at a loss to understand how side-by-side comparisons of benefits and representations that benefits are identical and "unchanged" and that the company with the power to reduce or eliminate them has a "bright future" are not about benefit terms and plan administration.

See also Willett v. Blue Cross & Blue Shield of Alabama, 953 F.2d 1335, 1341 (11th Cir. 1992) (fiduciary cannot "cast a blind eye" to a co-fiduciary's breach).

In *Fischer, supra*, the Third Circuit specifically held, moreover, that a company cannot construct a "Chinese wall" between what it knows as a corporation and what the persons in the benefits department know as the plan administrator. The Third Circuit stated that "fiduciary obligations owed to plan participants ... cannot be circumvented by building a Chinese wall around those on whom plan participants reasonably rely for important information and guidance." 994 F.2d at 135.

Noticeably, none of the circuit court decisions the Company cites supports its position. The Third Circuit's decision in *Blaw Knox Ret. Inc. Plan v. White Consol. Indus.*, 998 F.2d 1185 (3d Cir. 1993), did not involve any misrepresentations. It also did not alter *Fischer v. Philadelphia Electric, supra*, or the other Third Circuit precedent cited above. The Fifth Circuit's decision in *Borst v. Chevron Corp.*, 36 F.3d 1308 Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), did not concern misrepresentations that caused the participants or beneficiaries to suffer any injury. The Seventh Circuit's decision in *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988), only involved an employer's complete silence about a severance plan it was about to start. In other decisions, the Seventh Circuit has firmly taken the side that affirmative misrepresentations by corporate fiduciaries are a breach of duty. *See Anweiler v. American Elec. Power*

Service Corp., supra, 3 F.3d at 991.[8]

B. The Eighth Circuit Ordered Appropriate Equitable Relief

The plain language of Section 502(a)(3) provides that a participant may sue to obtain appropriate equitable relief for a violation of any provision of this title, which includes a breach of fiduciary duty. Amicus U.S. Chamber of Commerce argues that the restitution the Eighth Circuit granted is unavailable because it functions as a substitute for the monetary damages *Mertens* forbids. Amicus Br. at 22-26. NELA does not believe this issue is properly before the Court since Petitioner did not raise it, but offers the following rebuttal to indicate amicus' position were this Court to request full briefing.

Defendants routinely argue that plaintiffs use equity to substitute for monetary relief when plaintiffs are not offered monetary relief by a statute. Arguments such as the Chamber's have been made and rejected, *inter alia*, in Title VII cases in which relief must be equitable and in class actions in which plaintiffs seek Rule 23(b)(2) certification based on having claims for injunctive relief. Courts have held that seeking the financial benefits of an injunctive or other equitable order is hardly disqualification from obtaining appropriate equitable relief. *See, e.g., Forbush v.*

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[8] Petitioner also cites a Ninth Circuit case, *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990), holding that a company's role in collective bargaining is not a fiduciary one. There is no suggestion that Varity was participating in collective bargaining negotiations here.

J.C. Penney Pension Plan, 994 F.2d 1101, 1105 n.3 (5th Cir. 1993). See also *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 570-71 (1990) ("restitutionary" relief or relief "incidental or intertwined with" injunctive relief may be considered equitable).

In *Reich v. Continental Ins.*, 33 F.3d 754, 756-57 (7th Cir. 1994), Judge Posner explained that equitable restitution encompasses recovery for a party's "unjust avoidance" of a "loss" or "obligation." When a company has an "obligation" that it avoids through a breach of fiduciary duty or other violation of ERISA Title I, Section 502(a)(3) authorizes the federal courts to order appropriate equitable relief including restitution. *Accord Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (back pay awarded under Section 502(a)(3) was restitutionary).[9]

While restitution and compensatory damages may, in some cases, both provide financial relief, they are not the same, as a comparison of two earlier Supreme Court cases with this case illustrates. In *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), Doris Russell sought extracontractual and punitive damages for delay and mishandling of her benefit claim. She could not have obtained the relief she prayed for by asking for restitution based on the value of the obligation that Massachusetts Mutual had unjustly avoided: Massachusetts Mutual's gain did not equal her losses. Likewise, in *Mertens v. Hewitt*

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[9] *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (9th Cir. 1993), is the only ERISA case that seems to accept the proposition that if an equitable order involves money it must be characterized as legal.

Associates, 113 S.Ct. 2063 (1993), William Mertens and the other plaintiffs sought consequential damages from Hewitt Associates resulting from Hewitt's allegedly bad actuarial advice. They could not have obtained the relief they wanted by seeking restitution for any unjust gain or avoidance of loss on the part of Hewitt Associates. Here, by contrast, the Eighth Circuit only ordered restitution for Varity's unjust avoidance of its benefit obligations. It did not order that Varity pay compensatory damages resulting from its breach (e.g., consequential damages if medical conditions of retirees worsened due to the termination of health insurance coverage after MCC's collapse).

III. The Court Should Reserve Judgment on Other Avenues for Relief

NELA urges the Court to reserve judgment on other avenues for relief if this Court were to adopt the Company's arguments that equitable relief to relieve a breach of fiduciary duty is not available to individual participants or that the Company's misrepresentations here were not in breach of fiduciary duty. The Eighth Circuit has reserved judgment both on (i) whether the Company's misrepresentations constitute a violation of ERISA Section 510, 29 U.S.C. § 1140, and (ii) whether the Company may be estopped from denying benefits to retirees under the Massey-Ferguson plan who relied on the Company's representations about MCC.

The Eighth Circuit should also revisit the availability of relief under state law if this Court were to accept Varity's contention that it spoke to its employees only in an employer-employee capacity. If the Company wants

insulation for misrepresentations it maintains were made as a corporation in a wholly non-fiduciary capacity, it cannot simultaneously obtain insulation from the responsibility that corporations have under state law for their misrepresentations.

While ERISA's preemption section is expansive, it need not leave employees remediless for misrepresentations made by their employers or other parties. A long line of decisions have held that misrepresentations of benefits by non-fiduciaries that induce employees to terminate their benefit coverage or otherwise change their position are actionable under state law. *See Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 906 (1995) (ERISA does not preempt claim alleging fraudulent inducement to retire under an early retirement benefits package by telling employees their jobs were about to be eliminated); *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990) (ERISA does not preempt claim against insurance agent for misrepresentations causing claimant to terminate prior coverage); *Martin v. Pate*, 749 F. Supp. 242 (S.D. Ala. 1990), *aff'd sub nom. Martin v. Continental Investors*, 934 F.2d 1265 (11th Cir. 1991) (claim of fraud in inducement to become beneficiary not preempted); *Pace v. Signal Technology Corp.*, 628 N.E.2d 20 (Mass. 1994) (ERISA does not preempt state law misrepresentation claim when employer misrepresents whether the employee will be covered by insurance, including long term disability, for period after job termination); *HealthAmerica v. Menton*, 551 So.2d 235 (Ala. 1989), *cert. denied*, 493 U.S. 1093 (1990) (claim of fraud in inducement to become beneficiary not preempted).

Employers like Varity who "sucker punch" employee plan beneficiaries should not have it both ways. They should not be permitted to maintain that they delivered misrepresentations only as an employer to an employee in order to escape ERISA's remedies, and simultaneously maintain they may also escape state law remedies for misrepresentations by an employer to an employee because of ERISA preemption. Some semblance of reasonableness and balance must govern.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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July 26, 1995